

**FILED**

August 20, 2020

CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**BY: \_\_\_\_\_ **JU**  
DEPUTY

<b>LINDA JANN LEWIS, MADISON LEE,</b>	§	
<b>ELLEN SWEETS, BENNY</b>	§	
<b>ALEXANDER, GEORGE MORGAN,</b>	§	
<b>VOTO LATINO, TEXAS STATE</b>	§	
<b>CONFERENCE OF THE NATIONAL</b>	§	<b>Civil Action No. 5:20-cv-00577-OLG</b>
<b>ASSOCIATION FOR THE</b>	§	
<b>ADVANCEMENT OF COLORED</b>	§	
<b>PEOPLE; and TEXAS ALLIANCE FOR</b>	§	
<b>RETIRED AMERICANS,</b>	§	
<i>Plaintiffs,</i>	§	
	§	
<b>v.</b>	§	
	§	
<b>RUTH HUGHS, in her official capacity as</b>	§	
<b>the Texas Secretary of State,</b>	§	
<i>Defendant.</i>	§	

**ORDER**

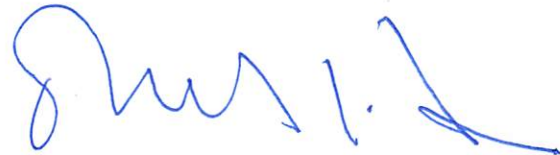
On this day, the Court considered the status of the above-captioned case. On July 28, 2020, the Court denied the Secretary's motion to dismiss on sovereign immunity grounds. *See* docket no. 31. For the reasons stated in that Order, the Court rejects the Secretary's argument that sovereign immunity bars Plaintiffs' claims. *See id.* at 14-17. On August 7, 2020, the Secretary appealed that Order, as the denial of sovereign immunity is immediately appealable under the collateral-order doctrine. *See* docket no. 32 (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 (1993)). The Secretary then filed an advisory stating that her understanding of the law is that an interlocutory appeal of a denial of sovereign immunity divests this Court of jurisdiction. *See* docket no. 33 (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)). In a responding advisory, Plaintiffs disagree that this Court automatically loses jurisdiction pending the outcome of the appeal, as they argue that the Secretary's appeal is frivolous and dilatory. *See* docket no. 35 (citing *Weingarten Realty*

*Inv'rs v. Miller*, 661 F.3d 904, 908 (5th Cir. 2011)). Though Plaintiffs do not file a motion to certify the appeal as frivolous, the Court will consider its jurisdiction in the interest of judicial efficiency.

As a general rule, “a notice of appeal [of an order denying immunity] . . . [gives] the appellate court sole jurisdiction and divest[s] the trial court of jurisdiction to proceed with the case.” *BancPass, Inc. v. Highway Toll Admin., L.L.C.*, 863 F.3d 391, 398 (5th Cir. 2017) (quoting *United States v. Dunbar*, 611 F.2d 985, 987 (5th Cir. 1980)). In *Dunbar*, the Fifth Circuit outlined an exception to this general rule in the context of interlocutory appeals of double jeopardy: district courts may maintain jurisdiction if they certify that the appeal is frivolous. *Dunbar*, 611 F.2d at 988. In *BancPass*, the Fifth Circuit extended the availability of this exception to denials of immunity in civil cases, such as here, noting that other circuits had found it proper when a “disposition is so plainly correct that nothing can be said on the other side.” 863 F.3d at 399 (quoting *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989)). The Fifth Circuit further noted that the “rule is a permissive one: the district court *may* keep jurisdiction, but is not required to do so . . . [and] ‘[s]uch a power must be used with restraint.’” *Id.* (quoting *Apostol*, 870 F.2d at 1339).

In light of this standard, the Court declines to exercise jurisdiction pending the outcome of the appeal.

SIGNED this 20 day of August, 2020.




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ORLANDO L. GARCIA  
CHIEF UNITED STATES DISTRICT JUDGE